



OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

November 13, 2002

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2002-6479

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172114.

The Texas Department of Insurance (the "department") received four requests for Exhibits 2 and 3 deemed confidential in the cease and desist order against Farmers Insurance Exchange and Fire Insurance Exchange ("Farmers"). You assert that the requested information is excepted from public disclosure under section 552.107(2) of the Government Code and that Farmers may have a proprietary interest in the information. The department has notified Farmers of the requests for information. Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exception you claim and Farmers's arguments.

Section 552.301(b) requires a governmental body to ask for an attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business day after the date of receiving the written request. The department received the first request for information on August 26, 2002. The department asserted the applicability of section 552.107(2) on September 30, 2002. Consequently, the department failed to comply with section 552.301(a) of the Government Code. Accordingly, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). This office has held that a compelling

reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). The applicability of section 552.107(2) and Farmers's proprietary interest are compelling reasons to overcome the presumption of openness.

Section 552.107(2) of the Government Code excepts from required public disclosure information if "a court by order has prohibited disclosure of the information." You urge that the department is prohibited by court order from disclosing Exhibits 2 and 3, and explain that a Travis County district court had entered a temporary restraining order prohibiting the release of these documents in *Farmers Ins. Exch. and Fire Ins. Exch. v. Jose Montemayor & Tex. Dep't of Ins.*, No. GN203156 (353rd Dist. Ct., Travis County, Tex., Sept. 25, 2002). However, the temporary restraining order has expired, and the court has since entered an Order Granting Temporary Injunction in Part, Denying Temporary Injunction in Part and Unsealing Exhibits in *State of Tex. & the Tex. Comm'r of Ins. v. Farmers Group, Inc.*, No. GV202501, and *Farmers Ins. Exch. and Fire Ins. Exch. v. Jose Montemayor & Tex. Dep't of Ins.*, No. GN203156 (353rd Dist. Ct., Travis County, Tex., Oct. 28, 2002). In the temporary injunction, the court ruled that the department is enjoined from disclosing the data in the columns entitled "Distribution of Business" in Farmers's Exhibit 2. However, the court concluded that the remainder of Exhibit 2 and all of Exhibit 3 do not contain trade secret information and may be disclosed. The court stayed its order for ten days from the date of the signing of the order. The court signed the order on October 28, 2002. The tenth day from the signing of the order is November 7, 2002. Farmers has not appealed the court's order. Thus, the department must withhold the data in the columns entitled "Distribution of Business" in Farmers's Exhibit 2 only pursuant to section 552.107(2). Because the court ruled that the remainder of the information is not protected by Farmers's trade secret interest, and Farmers has not appealed the ruling, we defer to the court's determination. Section 552.107(2) is therefore dispositive as to Farmers's trade secret interest, and we do not address Farmers's section 552.110 claim.

Farmers also asserts that the information is confidential under section 9 of article 1.15 of the Insurance Code and section 17.61(f) of the Business and Commerce Code. Under article 1.15, the department is required to visit each insurance carrier at least once every three years and examine its financial condition, ability to meet liabilities, and compliance with laws affecting the conduct of its business. Ins. Code art. 1.15, § 1; *see* Open Records Decision No. 640 (1996). In connection with this examination process, section 9 of article 1.15 provides:

A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law This section applies if the carrier examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or a receivership under this code or another insurance law of this state.

The department has not informed this office that Farmers's exhibits were obtained during the course of an examination under article 1.15. In fact, it appears that the department conducted its examination pursuant to section 5 of article 21.21 of the Insurance Code. *See* Ins. Code art. 21.21, § 5 (authorizing examination of whether person engaged in business of insurance engaged in unfair method of competition or unfair or deceptive act or practice); *see also* Emergency Cease and Desist Order of Texas Commissioner of Insurance (Aug. 13, 2002) (ordering Farmers to cease and desist unfair practice in violation of Ins. Code art. 21.21, § 3). Thus, we conclude that the remainder of Exhibit 2 and all of Exhibit 3 are not confidential under section 9 of article 1.15 of the Insurance Code.

Section 17.61(f) of the Business and Commerce Code provides in pertinent part as follows:

No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the persons who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

This provision requires the Office of the Attorney General to withhold all documentary material the consumer protection division obtained pursuant to a Civil Investigative Demand. Bus. & Com. Code § 17.45(8) ("consumer protection division" means the antitrust and consumer protection division of the attorney general's office). In this instance, a court has ordered the disclosure of Exhibit 2 in redacted form and all of Exhibit 3. We therefore conclude that the department may not withhold this information under section 17.61(f) of the Business and Commerce Code.

In summary, the department must withhold the data in the columns entitled "Distribution of Business" in Farmers's Exhibit 2. The department must release the remainder of Exhibit 2 and all of Exhibit 3.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

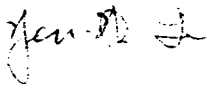
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 172114

Enc. Submitted documents

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